

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of NEAL and MARY  
BYRNES.

MARY E. CLAUSEN,

Plaintiff and Respondent,

v.

NEAL T. BYRNES,

Defendant and Appellant.

DEPARTMENT OF CHILD SUPPORT  
SERVICES,

Intervener and Respondent.

D059419

(Super. Ct. No. DN114111)

APPEAL from orders of the Superior Court of San Diego County, William Wood,  
Commissioner. Reversed in part with directions; affirmed in part.

Appellant Neal Byrnes (Byrnes) appeals from postjudgment orders denying his requested modification of his child support obligations, payable to his former wife respondent Mary E. Clausen (Clausen). In 2004, the parties stipulated to Byrnes's support obligation regarding Emily, the only child of their marriage, but also regarding Clausen's son Kyle, with whom Byrnes formerly had a stepparent relationship (until 2006, when Kyle was 15 and Byrnes relinquished all parental rights in favor of Clausen's new husband). Critically, the 2004 child support order in the amount of \$703 per month was unallocated between Kyle and Emily, and it also set a payment amount of \$500 toward certain arrearages. Beginning in 2004, this court order was enforced by respondent Department of Child Support Services for the County of San Diego (the Department), through its issuance of administrative orders withholding that amount of Byrnes's income for child support. (Fam. Code,<sup>1</sup> §§ 5246, 17400 et seq. [providing for local agency operations for support enforcement].)

Through his motion to set aside or vacate orders, filed in October 2010, Byrnes sought equitable relief based on the portion of the record showing that on October 6, 2008, Department personnel had prepared a new administrative order withholding income, to reduce the amount that was being withheld (from \$703 to \$439), sometime after Byrnes apparently notified the Department that Kyle had been adopted by Clausen's new husband. Byrnes objected to the Department's further action that was taken in August 2010, when it replaced its administrative order withholding income with a new

---

<sup>1</sup> All further statutory references are to the Family Code unless otherwise specified.

one, that restored the original \$703 amount and the \$500 per month for arrearages. The Department created the replacement order while its companion motion to modify the underlying child support order was pending, with a hearing date originally set in April 2010.

In Byrnes's motion, heard together with the Department's motion, he sought an order for reinstatement of the previous administrative order amount, nunc pro tunc. He argued he was entitled to relief for the time period from October 2008 forward, on the ground that he told the Department that his only obligation then was to support Emily, not Kyle. (See §§ 3691, 3693 [some discretion to grant relief on equitable grounds].)

The commissioner (the family court) ruled on both motions January 5, 2011, ordering that Byrnes's prospective monthly support obligation for Emily only was reduced to \$348, effective April 1, 2010, as the amount prescribed by the guidelines. The court denied all other relief and continued the matter solely to deal with certain arrearages (medical); the result of that hearing is not in our record.<sup>2</sup> Byrnes appeals the orders of January 5, 2011, which we construe as encompassing the companion motions.

The rule is "that a court's equitable powers with respect to child support" cannot extend beyond enforcement of judgment decisions, nor may the court's equitable power be used to violate otherwise applicable child support statutory provisions. (*County of Santa Clara v. Wilson* (2003) 111 Cal.App.4th 1324, 1327 (*Wilson*).) In its ruling, the

---

<sup>2</sup> The record does not show whether Byrnes currently owes arrearages for Emily or any that are attributable to Kyle. He paid substantial arrearages in July 2008.

family court correctly applied section 3651, subdivision (a), by refusing to modify or terminate the \$703 monthly unallocated child support order as to Emily, "as to an amount that accrued before the date of the filing of the notice of motion . . . to modify or terminate." (§ 3651, subd. (c)(1).) Section 3653, subdivision (a), likewise required: "An order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion . . . to modify or terminate, or to any subsequent date" (with some exceptions not applicable here).

However, the family court's ruling on these two companion matters did not adequately account for another issue squarely presented by Byrnes, i.e., how the order denying any requested relief, regarding enforcement of judgment for arrearages, might adversely affect Byrnes with regard to his no longer existing support obligation to Kyle. The record does not currently account for all the relevant factors required for setting the appropriate amount of monthly support for Emily from 2004 to the present and for enforcing any unallocated support arrearages.

As will be explained, we reverse the order in part to return the matter to the family court for the limited purpose of assessing, in an exercise of its discretion, whether equitable factors justify a limitation on the enforcement of judgment for support arrearages, by allowing any credit or offset based on a recalculation of any arrearages that may have been assessed on behalf of Kyle, in light of any findings of fact made regarding communications Byrnes made to the Department by October 2008, about Kyle's adoption

by another, and the effect of Kyle reaching the age of 18 in 2009. (§§ 3601, 3692, 3693.)  
The balance of the orders is affirmed.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Original Support Orders

When Byrnes and Clausen were married in 1995, she had one son, Kyle, born in 1991. In 1996, their daughter Emily was born. The parents separated in 2000 and their stipulated judgment of dissolution and child custody and support issues was filed in 2001.

As relevant here, the parties reached a stipulation on December 17, 2003, to enter various custody orders and a stipulated judgment for child support arrearages, as well as a prospective monthly child support amount to be paid to Clausen, \$703, but without allocating that amount between Kyle and Emily. The findings and order after hearing were filed February 4, 2004. This order after hearing also imposed on Byrnes a payment of \$500 monthly for past due child support that was reflected in the stipulated judgments representing the 2003 time frame, covering medical expenses and child care costs.

In 2004, the Department became involved in the case for enforcement purposes under the provisions of section 17400 et seq. In October 2004, it gave Byrnes and his employer notice that it was processing an amended administrative "original income withholding order/notice for support (IWO)," setting the amount Byrnes would pay for both Kyle and Emily (i.e., monthly support of \$703, plus \$500 monthly for past due child support).

Later, Clausen remarried, and in August 2006, Byrnes relinquished all parental rights to his stepson, Kyle, to enable Clausen's new husband (nonparty Blair Clausen) to complete a stepparent adoption of Kyle, effective December 2006. Byrnes remained responsible for his daughter Emily's support. It is not disputed that nothing was done to expressly or formally address any change in his child support orders or obligations. In his declaration, he states he contacted the Department around that time to notify it of the adoption of Kyle and to request modification of the child support order.

In July 2008, Byrnes paid over \$18,000 arrearages of child support. On October 6, 2008, the Department prepared and processed an administrative "original income withholding order/notice for support (IWO)," resetting the amount Byrnes would pay for Emily at \$439 per month (no arrearages). Byrnes's wages were garnished in that amount, starting in the last half of 2008.

#### B. Current Motion Proceedings; Rulings

On March 18, 2010, the Department filed its motion for modification of Byrnes's child support obligation, to seek the court's assistance to impose a support obligation according to guidelines. It referred to the existing order of February 4, 2004, as to both Kyle and Emily, but inaccurately specified the \$439 order (from October 2008) as the one to be modified. After an assigned hearing date in April 2010, the matter was continued several times until January 5, 2011. The Department supplied Byrnes's income and expense declaration, which included the information that he now has another young

child and is a single parent, due to the recent death of that child's mother. He asked the court to impute income to Clausen, Emily's other parent.

While its motion was pending, the Department prepared an amended administrative income withholding order on August 1, 2010, which restored the previous amount of withholding from Byrnes's wages of \$703 per month child support, and additionally, \$500 per month for arrearages.

Byrnes objected to the increase, and obtained an order to show cause re: modification of child support (also continued for hearing until January 2011). According to Byrnes, he had contacted the Department to notify it of the adoption of Kyle and his relinquishment of parental rights, the October 2008 administrative income withholding order reflected this correction, and he was entitled to its reinstatement nunc pro tunc. He relied on sections 3691 and 3693 for relief.<sup>3</sup>

In October 2010, Clausen filed her responsive declaration in opposition to Byrnes's requests. The family court heard argument on both motions on January 5, 2011, and addressed numerous other issues not involved in this appeal. This legal question

---

<sup>3</sup> Section 3691 provides: "The grounds and time limits for an action or motion to set aside a support order, or any part or parts thereof, are governed by this section and shall be one of the following: [¶] (a) Actual fraud. . . . [¶] (b) Perjury. . . . [¶] (c) Lack of Notice. . . ." The time limit for a section 3691 motion to set aside a support order generally is six months after the date on which the complaining party discovered or reasonably should have discovered the specific ground on which the order could be set aside. (§ 3691, subds. (a), (b), (c).) Under section 3692, relief from support orders may not be granted simply because the court finds that an order was inequitable when made. However, section 3693 allows some limited degree of equitable relief from portions or the entirety of a support order.

regarding modification of support was resolved on the pleadings without specific argument. The court accepted the analysis of the Department, that the operative child support amount under the 2004 unallocated order was \$703 per month. Therefore, the court ruled (1) there was no basis under section 3691 to set aside the August 2010 income withholding order, which was administrative in nature and not a court order; (2) there was likewise no basis to reinstate the reduced wage assignment order of October 2008, which represented an administrative method of enforcing the underlying (2004) child support order; (3) the request to enter an order nunc pro tunc to modify the child support amount to \$439 per month would be denied, and the previous administrative withholding order of October 2008 would not be reinstated, because any such order would improperly retroactively modify the existing child support obligation. (§ 3653.)

The court then set a new child support amount for Byrnes to pay for Emily, \$348 per month according to guidelines, prospectively from April 1, 2010 (approximately when the motion proceedings began, in compliance with § 3653). The court continued the matter solely to deal with a remaining issue on unreimbursed health care arrearages (not involved in this appeal). Byrnes appeals.

## DISCUSSION

### I

#### *INTRODUCTION*

On appeal of the adverse rulings, Byrnes contends the family court erred or abused its discretion because: (1) he was denied his due process rights to be heard on support

obligations before the Department changed the October 2008 administrative income withholding order, by increasing it in the August 2010 administrative order; (2) the Department's errors in changing the administrative withholding orders prejudiced him, so that the later order should be vacated under principles of equity; and (3) the court should have modified the child support orders nunc pro tunc to restore the October 2008 order deducting only \$439 per month, since Byrnes should no longer be responsible for Kyle's support.

On appeal, only the Department has filed a respondent's brief. At its unopposed request, we have augmented the record to include copies of the original judgment and various support orders that were not included in the clerk's transcript.

To address Byrnes's claims, we first set out rules of review and distinguish between the existing 2004 court support order, and the Department's administrative withholding enforcement efforts. (§ 5246 et seq.) We apply established rules governing equitable relief from judgment, together with statutory principles that disallow retroactive modification of child support obligations while allowing some equitable discretion with regard to enforcement of judgment on support arrearages. (*Wilson, supra*, 111 Cal.App.4th 1324, 1326-1327.)

In applying all these principles, we must keep our focus upon Emily's existing entitlement to support, not upon the respective interests of Clausen or Byrnes in obtaining or avoiding payment. It is well settled that " 'the child's need for sustenance must be the paramount consideration' " and the support obligation " 'runs to the child and not the

parent." ' " (*In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 625 (*Tavares*).)

Kyle, however, is not in that position now.

## II

### *MODIFICATION OF SUPPORT ORDERS; REVIEW*

Modifications of child support awards are normally reviewed for abuse of discretion. (*In re Marriage of Butler & Gill* (1997) 53 Cal.App.4th 462, 465.) "[I]n reviewing child support orders we must also recognize that determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule." (*Ibid.*)

An appellate court reviewing a ruling on a motion for equitable relief to vacate a support judgment or order looks for any abuse of such circumscribed discretion. The reviewing court will determine "whether that decision exceeded the bounds of reason in light of the circumstances before the court. [Citation.] In doing so, we determine whether the trial court's factual findings are supported by substantial evidence [citation] and independently review its statutory interpretations and legal conclusions." (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230 (*Gorham*).)

The family court "may modify or terminate a support order as the court determines to be necessary (§ 3651, subd. (a)) following the procedures described in sections 3650 to 3693. A party must show changed circumstances to justify a modification." (*In re Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1287-1288 (*Brinkman*).) The statutory procedures for modification of child support " 'require a party to introduce

admissible evidence of changed circumstances as a necessary predicate for modification.' " (*Id.* at p. 1288.) Under section 3601, subdivision (a), a support obligation may be terminated by operation of law. (*Brinkman, supra*, at pp. 1287-1288 [termination by operation of law occurs when the child reaches majority, or a predetermined contingency happens, or there is a bankruptcy discharge of the child support obligation].) Severance of parental rights qualifies as such an event. (*County of Orange v. Rosales* (2002) 99 Cal.App.4th 1214, 1219-1220 (*Rosales*).)

In determining whether to modify the support order according to the allowable procedures of sections 3650 to 3693, the family court properly adhered to the rule set forth in section 3692: "Notwithstanding any other provision of this article, or any other law, a support order may not be set aside simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the support ordered to become excessive or inadequate." The court was also subject to the restrictions of section 3693 upon the exercise of its discretion in modifying or setting aside a support order, providing that it could "set aside only those provisions materially affected by the circumstances leading to the court's decision to grant relief."

### III

#### *RELIEF FROM ENFORCEMENT OF SUPPORT ARREARAGES*

##### A. Legal Principles

The important distinctions between modifying child support orders, and enforcing a support arrearages judgment, were well summarized in *Tavares, supra*, 151

Cal.App.4th 620, as follows: "The Legislature has established a bright-line rule that accrued child support vests and may not be adjusted up or down. [Citations.] If a parent feels the amount ordered is too high--or too low--he or she must seek prospective modification. [Citations.] Accordingly, a trial court has no discretion to absolve an obligor of support arrearages, or interest thereon." (*Id.* at pp. 625-626.) However, where a credit of "overpayments" may be justified, the court retains equitable discretion concerning the extent of the appropriate enforcement of the judgment for accrued support, which represents the same underlying child support obligation as do the monthly payments. (§ 290; *Wilson, supra*, 111 Cal.App.4th 1324, 1326-1327; see *Messenger v. Messenger* (1956) 46 Cal.2d 619, 630.)

*In re Marriage of Perez* (1995) 35 Cal.App.4th 77, 80 (*Perez*) clarifies that: " 'Accrued arrearages are treated like a money judgment,' " and "[a]lthough a decree for support 'may be modified as to installments to become due in the future [,] [a]s to accrued installments it is final.' [Citation.]" (*Ibid.*)

In *Gorham, supra*, 186 Cal.App.4th 1215, 1232, this court commented that section 3691 should not be interpreted to preempt "a trial court's traditional or inherent equitable power to set aside a child support order or judgment . . . ." In that case, the record disclosed that both paternity and child support orders were obtained by a local department of child support services, through the use of a fraudulent proof of service, which defective service had prevented the court from obtaining personal jurisdiction over the supposed obligor. In reaching our conclusions that personal jurisdiction was lacking,

so that subsequent orders were unenforceable, we relied on the Child Support Enforcement Fairness Act of 2000 (Fairness Act), which included a statement that "[t]he efficient and fair enforcement of child support orders is essential to ensuring compliance with those orders and respect for the administration of justice." (Stats. 1999, ch. 653, § 1, p. 4708.)

#### B. Distinction between Judicial Orders and Administrative Orders

The statutory scheme for child support enforcement includes section 5230, subdivision (a), anticipating that court orders that impose or modify child support obligations may be coupled with judicial earnings assignment orders for payment of support and arrearages. Where, as here, the local child support agency is pursuing enforcement under section 5246, subdivision (b), an administrative order/notice to withhold income for child support may be used in lieu of such a judicial earnings assignment order. (§ 17400 et seq.)

Under section 5246, subdivision (d)(1), such an administrative order/notice to withhold income "may not reduce the current amount withheld for court-ordered child support." Also, section 5246, subdivision (e) provides that the child support obligor may request a hearing on the accuracy of the administrative order/notice, on grounds including (1) he or she is not the correct obligor, or (2) the payment of arrearages as specified in the order/notice to withhold income for child support is excessive or the total arrearages owing is incorrect. (§ 5246, subd. (e)(1), (2).) At the hearing, the court may provide appropriate relief, such as quashing service of the order, or modifying it to an amount that

is "fair and reasonable considering the circumstances of the parties and the best interest of the child." (§ 5246, subd. (e)(2).)

#### IV

##### *APPLICATION OF RULES*

###### A. Problems Presented

Because this record discloses the essential facts are undisputed, the application of statutory and legal principles presents only issues of law, on whether Byrnes has shown any error in law or abuse of discretion in the family court's denial of his motion to vacate the August 2010 administrative order, or in its ruling on the Department's motion. (*Gorham, supra*, 186 Cal.App.4th at pp. 1229-1230.) Our task is to examine whether Byrnes's judicially imposed support obligation, as its terms were administered by the Department, is subject to equitable adjustment with regard to enforcement of judgment, even if the principles disallowing retroactive modification of support orders are observed. In accordance with the provisions of section 3693, the court had the flexibility to modify or set aside a defective support order (including support arrearages), but it could "set aside only those provisions materially affected by the circumstances leading to the court's decision to grant relief."

This record lends itself to an interpretation that for the period after October 2008 to the time of the hearing, some arrearages may have been incorrectly collected regarding Kyle's support. Kyle turned 18 in 2009. Under the standards applicable to enforcement of judgments for support arrearages (not modification of support orders), the family court

had the ability to consider whether some equitable adjustment of the judgment amount for any unallocated arrearages related to Kyle was appropriate, due to Kyle's adoption by another father, his age, and the evident confusion about the distinction between court orders and the various administrative orders. Such confusion is demonstrated in the Department's motion papers, which referred to the existing court order of February 4, 2004, as applicable to both Kyle and Emily, but incorrectly specified its \$439 administrative order (October 2008) as to Emily as the one to be modified.

Because of the statutory distinction between the operative court support order (2004) and the administrative income withholding orders (2008 and 2010), we must reject Byrnes's initial claims that he had any due process rights to be heard before the Department changed the October 2008 administrative order and increased it in August 2010. Nor is he justified in contending that he was entitled to an order restoring the October 2008 administrative order, *nunc pro tunc*.

The Department performs its duties as prescribed by statute, and it did not undertake any role of advocacy, but only sought to enforce existing court orders. (See § 5246; 11 Witkin, Summary of Cal. Law (10th ed. 2005) Husband & Wife, § 318, p. 421.) Mistakes were made administratively, but the underlying court order was never modified. Despite any misunderstandings Byrnes was under as a layperson communicating with Department personnel, the administrative process did not somehow develop authority to change the underlying, unallocated \$703 monthly support court order. The order continued in effect and was not incorrect as to Emily.

Moreover, to the extent Byrnes disagreed with the Department's conduct, he could have earlier sought relief in the family court in accordance with applicable statutory provisions, and the Department provides us with its standard notification forms given to him at the time the orders were formalized into a judgment. Equity claims are inapposite where the requested relief "is plainly covered by statute," and "there is no inequity in assessing" amounts actually due under an existing order. (*Perez, supra*, 35 Cal.App.4th 77, 80-81.) Thus, the Department's position on appeal is correct that the operative child support order dates back to February 2004, and no court modified it until this January 2011 hearing (retroactively to the approximate time of filing of the first motion, April 2010).

Nevertheless, this record still raises questions about whether the August 2010 administrative order including collection of arrearages, as well as \$703 monthly support, actually went into effect and resulted in garnishment of wages before the hearing date in January 2011. At the next hearing date, the family court addressed medical arrearages issues that remained, but the record does not reflect what happened and whether those issues concerned arrearages as to Kyle in any way.

Because the record is unclear in several respects, we find some merit in a portion of Byrnes's final argument, that he mistakenly relied on the Department's 2008 actions in changing the administrative withholding order. The only possible prejudice to him, however, that would justify any potential relief under principles of equity, would be if an accounting shows that any collection of arrearages went beyond the amount he properly

owed because of his obligation to Emily, and instead went toward a no longer existing obligation to support Kyle. Although this case is distinguishable from *Gorham, supra*, 186 Cal.App.4th 1215, in which there was no personal jurisdiction over the supposed support obligor, there are similar jurisdictional problems in requiring a former parent to continue to support a child for a period after his parental rights have been terminated. (*Rosales, supra*, 99 Cal.App.4th at pp. 1219-1220.)

In reaching these conclusions, we need not rely upon principles of equitable estoppel, as they are outlined in *Brinkman, supra*, 111 Cal.App.4th 1281, 1289-1290. Byrnes believes that he was misled by the Department, and claims he can show by clear and convincing evidence that " '(1) the party to be estopped knew the facts; (2) the other party was ignorant of the true facts; (3) the party intended his conduct would be acted upon, or acted in a manner that the party asserting the estoppel had a right to believe it so intended; and (4) the other party relied upon the conduct to his injury. Where one of the elements is missing, there can be no estoppel. [Citations.] The doctrine acts defensively only. It operates to prevent one from taking unfair advantage of another but not to give an unfair advantage to one seeking to invoke the doctrine. [Citation.]' " (*Ibid.*)

In this case, the essential facts available to both parties were that the 2004 court order remained in place, unallocated, and was not invalid, at least as to Emily. Even if any judicial determination would have been appropriate to declare Byrnes's support obligation as to Kyle was terminated by operation of law, it was never timely requested or made. (§ 3601, subd. (a), *Brinkman, supra*, 111 Cal.App.4th 1281, 1287-1288

[termination by operation of law occurs when the child reaches majority, etc.].) The family court was justified in refusing any nunc pro tunc change in the basic monthly support level, except for adjusting it to guidelines, as of the time the motion proceedings began. That is not the end of the inquiry, however, regarding any existing arrearages.

#### B. Discretion of Court; Remand for Further Proceedings

In its hearing of the companion motions, we believe the family court was presented with enough information to invoke its duty to consider all the equitable factors and to evaluate all the relevant circumstances regarding enforcement of judgment as to the existence of any support arrearages attributable solely to Kyle, for the period Byrnes requested (after October 2008). That problem remains for resolution, even though the \$703 monthly support obligation for Emily (and arrearages order) remained in place until the hearing, when it was appropriately adjusted by the court.

"Although a court may not 'disturb the accrual of payments under the original [child support] judgment,' it does have some equitable powers regarding the enforcement of the judgment. [Citation.] 'The court ha[s] equitable discretion to determine whether and to what extent the original support provision should be enforced by execution.' [Citation.]" (*Wilson, supra*, 111 Cal.App.4th 1324, 1326, italics omitted.)

The family court's ruling was consistent with section 3692, that a support order may not be set aside "simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the support ordered to become excessive or inadequate." But here, it would not amount to a retroactive modification to

determine whether the arrearages amount was inequitably overbroad, such as if it included any amounts incorrectly billed for Kyle. This inquiry under section 3693 was within the scope of the relief requested by Byrnes. On remand, the court shall treat collection of arrearages, if any remain as to Kyle, separately from the support orders applicable to Emily.

#### DISPOSITION

The order is reversed in part with directions to the family court to hold such further proceedings as will resolve, in an exercise of the court's discretion, whether any enforcement of judgment orders regarding support arrearages have incorrectly included any monies attributable to support of Kyle for the time period after October 2008; the balance of the order is affirmed. The parties shall bear their own costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.